United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1393

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1393

UNITED STATES OF AMERICA,

Appellee,

—vs.—

JOE TRUMAN BOYD, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT ROBERT E. FORD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

Other Authorities:

United States Court of Appeals

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Preliminary Statement

Robert E. Ford appeals from a judgment of conviction entered against him on December 2, 1975 after a jury trial before the Honorable Milton Pollock in the United States District Court for the Southern District of New York. He was sentenced to five years imprisonment upon each of the 53 counts of the indictment, to be served concurrently and pursuant to 18 U.S.C. § 4208 (a)(2) (A. 1163).*

* Citations herein preceded by "A." are to the appendices filed herein by the appellants Mullenax and Ford, respectively. In order to avoid confusion, those appendices have been numbered consecutively to each other.

Citations preceded by "Tr." are to the trial transcript.

Citations preceded by "GX" or "DX" are to government and defense exhibits. In view of the large quantity of documentary exhibits in this case, the appellant Ford will file a volume of relevant exhibits after issue has been joined by the filing of the government's brief.

Indictment 75 Cr. 140, filed on February 10, 1975, charged sixteen defendants in fifty-three counts (A. 16). All counts concerned activities of the defendants with respect to Select Enterprises, Inc. ["Select"]. Count 1 charged a conspiracy (18 U.S.C. § 371) to engage in mail, wire and securities fraud (18 U.S.C. §§ 1341 and 1343; 15 U.S.C. § 77q), sale of unregistered securities (15 U.S.C. § 77e) and false statements to the Securities and Exchange Commission (18 U.S.C. § 1001).

Counts 2 through 28 charged substantive crimes of mail and wire fraud; Counts 29 through 40 charged substantive crimes of securities fraud; Counts 41 through 51 charged substantive crimes with respect to the sale of unregistered securities; Counts 52 and 53 charged substantive false statement violations.

Each of the sixteen defendants was named in each count. Additionally, Indictment 75 Cr. 346 was filed on April 4, 1975. It was substantially identical to the already described indictment, except that it named only one defendant, S. Michael Gardner. Upon motion of the government, the District Court consolidated the two indictments for trial, thus raising the number of defendants to seventeen.*

Aside from Ford, the named defendants and the disposition as to each of them in the District Court were as follows:

The Convicted Defendants.

Ernest Darwin Goodloe ["Goodloe"] was convicted upon all counts and was sentenced to serve five years imprisonment.

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* In addition, the indictment named 4 unindicted conspirators. By a bill of particulars dated September 5, 1975 (A. 100), the Government named 32 additional conspirators. Thus, the overall conspiracy was alleged to have at least 54 conspirators.

Joe Truman Boyd ["Boyd"] was convicted on all counts and was sentenced to serve five years imprisonment.

M. S. Knisely ["Knisely"] was convicted upon all counts and was sentenced to serve five years imprisonment, two months of which was to be served in a jail-type institution and the remainder of the sentence was suspended. He was placed on probation for a period of two years.

Ernest R. Mullenax ["Mullenax"] was convicted upon Counts 1 through 51 and was sentenced to serve two years imprisonment, six months of which was to be served in a jailtype institution and the remainder of the sentence was suspended. He was placed on probation for a period of two years and he was fined $10,000 on Count 1.

The Acquitted Defendants.

Emerson F. Titlow ["Titlow"], William Wayne Barnett ["Barnett"], Marvin J. Rappaport ["Rappaport"], Stanley Schleger ["Schleger"], Edward Vanasco ["Vanasco"], Roger Bissett ["Bissett"] and S. Michael Gardner ["Gardner"] were acquitted on all counts.

The Severed Defendants.

Howard L. Brookshire ["Brookshire"] was granted a severance prior to trial upon the ground that substantial prejudice would result to him from a joint trial (A. 1147).

Selwyn Weber ["Weber"] was granted a severance in the midst of trial due to illness.

Alan Segal ["Segal"], James Calvin Joiner ["Joiner"] and John Wells ["Wells"], all entered pleas of guilty to one or more counts of the indictment and testified as government witnesses.

Questions Presented for Review

1. Did the trial court err when it refused to grant the appellant Ford a separate trial?

2. Was the appellant Ford deprived of a fair trial in that the trial proof demonstrated that the conspiracy count of the indictment, in fact, charged multiple conspiracies of which he was not a member?

3. Was the district court without venue jurisdiction since venue was predicated upon a stock manipulation conspiracy of which Ford was not a member?

4. Did the district court err in its charge with respect to the jury's obligation if it should find that the single conspiracy count of the indictment was, in fact, composed of several distinct conspiracies?

5. Did the trial court err in refusing to charge the jury with respect to the particular venue issue that was present in this case by virtue of the claim and proof as to multiple conspiracies?

6. Did the prosecution fail to establish that the appellant Ford was guilty beyond a reasonable doubt as to each of the charges of the indictment?

Statement of the Case

A. Introduction.

The trial of this case consisted of the testimony of numerous government witnesses concerning efforts to promote a dormant shell corporation by means of tactics which allegedly violated anti-fraud, securities and false statement statutes of the United States.

The conspiracy count of the indictment, which named all defendants, alleged the following to be the objective of the conspiracy:

> "The object of the conspiracy was to obtain control of a 'shell' corporation without any substantial assets, inflate artificially its price, and sell, pledge and distribute the shares at enormous profits to members of the public without providing material information required to be furnished by law." (A. 18)

The conspiracy count also alleged that the conspiracy was "carried out" by several distinct means:

1. Evasion of registration requirements;

2. Certification of a false statement as to the capital structure of Select;

3. Creation of an artificial market in Select stock by means of manipulation;

4. The making of false statements and writings in connection with a Securities and Exchange Commission ["SEC"] investigation of Select;

5. The sale, pledging and other disposition of Select stock to lenders, factors and purchasers (A. 18-20).

This brief will not attempt a comprehensive recitation of the trial proof. Since so little of the proof related to the appellant Ford, and since it is anticipated that the government, in an effort to sustain the charge, will present this Court with a detailed statement of its proof, we believe that the course we have chosen will avoid confusion and permit us to focus upon the true issues.*

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* The summation of government counsel is reproduced in the appendix at A. 729-802. Government counsel devoted his summation to a chronological review of the evidence. Practically every paragraph of the transcribed summation deals with some additional type of misconduct allegedly perpetrated by the defendants and a large number of unindicted co-conspirators.

B. Outline of the Government's Proof.

The government's principal trial witness was Alan Segal, a notorious criminal recidivist who specializes in stock fraud transactions. Ford is not mentioned once in Segal's lengthy testimony, nor is there any evidence that the two men ever met or that Ford had any knowledge of stock manipulations herein which were orchestrated by Segal of any of the activities of the brokers and dealers who testified as witnesses in this case.

An appropriate introduction to Segal is provided by this Court's recent opinion in *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975). That case involved the so-called Pioneer Development swindle which was conducted by Segal. It immediately preceded his involvement in the present case, and Circuit Judge Moore's capsule of the Pioneer Development scheme very closely parallels Segal's activities in the present case:

> "In early 1969 Acton and Clegg became interested in obtaining control of the outstanding shares of Pioneer, a dormant shell corporation whose stock was originally issued prior to the passage of the 1933 Securities Act. By July 31, 1969, they had accumulated enough shares to control Pioneer.
>
> "During the spring and summer of 1969, Acton and Clegg met and talked with Scardino at his recently acquired Riverside Hotel in Reno, Nevada. They explained their interest in initiating trading in the Pioneer stock which they were in the process of acquiring. Scardino told them that Alan Segal, a partner in the Riverside Hotel and a New York promoter, was very adept at stock trading and suggested that Clegg contact Segal. Shortly afterwards, Scardino arranged a meeting in Dallas. Scardino, Acton, Clegg and Segal were present.

Clegg explained to Segal that Acton and he controlled the majority of outstanding Pioneer stock and presented Segal with documentary material about Pioneer, Lone Tree Mining, and Precise Power, the latter two being companies which Pioneer had options to purchase. Segal took some of the stock and agreed that he would provide them with $500,000 in operating capital by trading it in New York. He stated that he would determine the price at which it would open and support the stock to make sure it did not decline in value. He also stipulated that the stock remaining with Acton and Clegg in the West was not to be sold on the open market. After the Dallas meeting, Acton, Scardino, Segal and others met at the Riverside Hotel in Reno and discussed their scheme further.

"In late September or early October, Segal, Acton, Clegg, Schiffman (Segal's attorney), and others met in Los Angeles. Segal repeated his promises and assurances, reminding his co-conspirators that he had to 'keep the shoe box' to be able to keep the price of the stock where he wanted it. Another meeting took place on October 23, 1969 at the Riverside Hotel, at which Segal received over 50,000 Pioneer shares to take to New York and begin trading.

"By October 30, 1969, Segal had commenced trading in Pioneer stock in New York at Karen & Co. through Joseph Azzerone, a broker, using a nominee, Francine Zahl, who was Segal's secretary. He arbitrarily selected $5.00 as the stock's opening price, and by means of directed trades, touting, misrepresentations, and a host of other incriminating misdeeds, he manipulated the price of the stock upward until it reached $9.00 per share. To sustain market activity in the stock he guaranteed purchases which he arranged

to be made by personal friends. He also used nominees to procure loans by pledging Pioneer stock as collateral.

"When, in early November, the $500,000 that Segal had promised to send to Acton and Clegg had not been received, Acton turned to Scardino for assistance. He informed Scardino that he needed money and that although he had promised Segal that he would not sell the stock, Segal would allow him to use it as collateral for a loan. Scardino agreed to secure a loan by pledging Pioneer stock which Acton would issue to him. However, upon receiving the stock Scardino and his employee, McKibbon, sold it. Part of the proceeds were given to Acton; Scardino and McKibbon split the rest. Not realizing the shares were being sold, Acton subsequently asked Scardino to arrange another 'loan', using additional shares. Either Scardino or McKibbon sold these shares as well.

"When these shares began to reach the eastern market, Segal reacted quickly. He contacted an associate, Gardner, told him the people he was working with in the West were robbing him, and asked him if he knew anyone who could resolve his problem. * * * " (526 F.2d at 520).

Many of the above noted characters entered this case in early January, 1970. During the weeks prior thereto, Boyd and Joiner discussed the merits of obtaining control of a shell corporation. Boyd located several, and it was decided that they would acquire one of these, Goldenfield Candelaria, Inc., which had been incorporated in Nevada in 1915. On January 5, 1970, Joiner introduced Boyd to Acton. A bank loan was secured to purchase the shell, and Acton agreed to introduce Boyd and Joiner to Segal (Tr. 965-974). On or about January 13, 1970, the four men met in Reno, Nevada. Over the next week or

so, Goldenfield Cardelaria underwent a name change to Select Enterprises, Inc. (Tr. 92, 972, 690). Segal made clear that, in view of his recent experience in Pioneer Development, he would require as much control as possible over the newly-acquired corporation. He wished to be supplied with: a complete due diligence file, certified financial statements of assets, deeds of properties which would be transferred into Select, complete access to the transfer agent in order to avoid "back dooring", and a copy of every trading transaction. In short, he wished to control all 1,156,000 shares of the corporation (Tr. 94).

Over the ensuing weeks, the "box" of stock was delivered to Segal in New York and he utilized his various brokerage associates to artificially create a market by means of spurious trading. The market opened on February 9, 1970 through a broker, Economic Planning Co., which placed Select in the "pink sheets". Trading continued on a sporadic basis through to May 7, 1970, with a grand total of some forty-seven trades having been accomplished.*

In the meanwhile, Boyd, Joiner and others in the West had accumulated and were continuing to accumulate apparent assets for Select. These included, *inter alia*, oil and gas leases, a mica mine, a furniture factory and California land. The Government's claim is that those assets were inflated in value for purposes of the Select balance sheet, and that such inflated values constituted

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* GX 353 lists each of the Select trades. The artificial market was accomplished by means of various Segal nominees and by Segal's pledging of various quantities of stock to cover personal, unrelated margin calls and bank loans to himself and some of his eastern associates. When the recipients of the pledged stock thereafter found themselves unsecure, they sold it on the market. As shown by GX 353, the price of the stock ranged from $10.50 per share to $17.75 per share.

fraud upon the public. Later alleged efforts to hide the fraud are claimed to support the charges of Counts 52 and 53 that false statements were supplied to the SEC.

C. The Appellant Ford.

Mr. Ford is a resident of Abilene, Texas, where he has been a member of the Bar of that State for over twenty-six years. He has been married for twenty years and has three children. Essentially a small town lawyer, Ford's practice involved trial work, real estate and land transactions. He is an honorably discharged veteran of World War II, and has never been convicted of a crime (A. 1327-8).

The evidence in this case demonstrates that he has never been an officer of Select nor a member of the board of directors (A. 1328). As will shortly be shown, his involvement in this case commenced solely by virtue of his being retained by the co-defendant Goodloe with respect to contracts and title opinions for certain acquisitions that eventually became assets of Select. As to other acquisitions, he had no involvement or knowledge (A. 1399).

Ford never discussed the issuance of stock with anyone in Nevada, he never spoke in person or by phone with any broker in New York concerning Select, he never gave an opinion to anyone concerning the free trading nature of Select stock, nor did he give any quotation as to the value of the stock (A. 1399). He never pledged or sold any of the stock. He never discussed the fabrication of evidence to be given to the Securities and Exchange Commission (A. 1400-1402).

The evidence in this case is thoroughly devoid of any showing that Ford thereafter engaged in any activities in behalf of Goodloe, Select or himself with fraudulent intent contrary to the securities laws. Significantly, there

was no showing that he had any expertise with respect to the securities laws. Indeed, he has never even had a stock brokerage account (A. 1400).

ARGUMENT

POINT I

The defendant was deprived of a fair trial by the court's refusal to grant his pre-trial motion for a separate trial. In any event, his motion for a judgment of acquittal as to the conspiracy count should have been granted in view of the government's proof, which demonstrated multiple conspiracies.

The government's trial proof failed to establish that Ford participated in or had any knowledge of the Segal market manipulations in New York or the requirement that a registration statement be filed with respect to Select. There was simply no evidence that he knew of or participated in any of the mailings or telephone conversations set forth in Counts 2 through 28 as being violations of 18 U.S.C. § 1341 and § 1343 or any of the pledges of Select securities upon which Counts 29 through 40 (15 U.S.C. §§ 77q and 77x) are predicated or any of the over-the-counter trades upon which Counts 41 through 51 (15 U.S.C. §§ 77e and 77x) are predicated.

The only argument available to the government was that Ford's involvement as an attorney with respect to certain of the Select acquisitions aided and abetted the false statement allegations contained in Counts 52 and 53. If Ford had been tried on the merits of that narrow charge, he stood a good chance of acquittal. The jury retired to deliberate in this case at 11:20 a.m. on October 17, 1975 (A. 916). Their deliberations continued into the evening hours and then resumed on the following day

and continued into the evening hours. It was only at the end of their third day of deliberations, with an intervening one day holiday, that the jury returned its verdict convicting Ford. Lest it be believed that the length of deliberations related to some other defendant, the jury did not hesitate to return verdicts of guilt and of acquittal, with respect to other defendants, during its second day of deliberations (A. 977).

It is within this context that Ford's motion for a separate trial and his multiple conspiracy claim must be viewed.

A. The Motion for a Severance Should Have Been Granted.

That this case presented a manifest substantial probability that an individual defendant would be smothered in the factually complex trial was recognized by Judge Pollock prior to trial when he granted a separate trial to the co-defendant Brookshire. The memorandum order granting a severance to Brookshire recited, *inter alia*, as follows:

> "Brookshire seemingly has met his burden of demonstrating that some substantial prejudice would result from a joint trial.
>
> "The general rule that persons indicted together should be tried together when the crimes charged against all defendants may be established by the same evidence does not apply to Brookshire because of his limited connection with the overall conspiracy and the brief period of his alleged involvement. To include him in a joint trial might result in engulfing him by inapplicably broad proof when his is only a narrow association at best." (A. 1147)

On the same day as he granted Brookshire's motion (July 21, 1975), Judge Pollock denied Ford's similar motion (A. 1162). The affidavit filed in support of that motion by counsel for Ford accurately predicted the complex nature of the trial, the overwhelming aura of corruption which would be generated by the activities of the government's own witnesses, as well as by the activities of co-defendants on trial, and the unlikelihood that the government would connect Ford to the variety of conspiratorial objectives which eventuated in proof of multiple conspiracies (A. 1148-1161).

Rule 14 of the Federal Rules of Criminal Procedure provides as follows:

> "Relief from prejudicial joinder.
>
> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide what other relief justice requires."

This rule reflects an accommodation between contending notions of expeditious criminal law enforcement and the inherent detriment to an accused encountered in a mass trial. A leading commentator aptly points out (8 *Moore's Federal Practice*—Cipes' Criminal Rules § 8.02[1], p. 8-3 [1970]):

> "The way in which a prosecutor chooses to combine offenses or defendants in a single indictment is perhaps second in importance only to his decision to prosecute. Whether a defendant is tried en mass with many other participants in an alleged crime, or in a separate trial of his own, will often be decisive of the outcome. * * *"

In *United States* v. *Kelly*, 349 F.2d 720 (2d Cir., 1965), this Court held that a defendant should have been granted a severance from his co-defendants so as to avoid, at the defendant's trial, the introduction of much prejudicial evidence which was irrelevant with respect to the defendant's guilt, and that "no amount of cautionary instructions could have undone the harm to [the defendant]." (349 F.2d at 758).

This Court had occasion to review the problem presented by complex stock fraud cases in *United States* v. *Dardi*, 330 F.2d 316, 329 (2d Cir., 1964). In responding to defendant's complaint, on appeal, as to the length of a complicated multi-defendant trial, this Court said:

> "There can be no scale by which to measure the proper length of a trial. * * * For the reasons specified and many others, long trials should be avoided. However, a multi-defendant stock fraud case, as involved as this one, usually necessitates delving into many financial transactions. Those who participate in such transactions do not supply the government with a simple and clear picture. The picture, even as on a jigsaw puzzle, only comes into vision by the assembling of hundreds of curiously shaped parts, each piece seemingly having no identity until it is fitted into and made a part of the whole. * * *"

The reasoning of *Dardi* is, of course, sound—when applied to a case involving a single conspiracy and where the defendant can reasonably be shown to have associated himself with the multiple objectives of a conspiracy such as that which is alleged to have existed in the present case. The proof here failed to establish such an association.

Wigmore on *Evidence* (3d Ed.), concisely makes the point:

"Where the array of persons called to testify on a given side mounts up in numbers, it is obvious that each additional witness increases, in almost geometrical ratio, the possibilities of confusing the issues and of thus diverting the jury from a clear and concentrated consideration of the precise issue in dispute. Each witness adds a new item of detail in his examination and cross-examination; * * * until amid the interminable entanglements of scores of witnesses and their statements it might become practically impossible for the jurymen to follow the thread of the substantial issue in controversy and to detect the truth of the evidence. The result would be the stifling of the truth, not its revelation, and the decision would probably turn upon the chance effect of fragments of evidence making casual impressions, rather than upon an orderly consideration of all the salient facts." (§ 1907)

"The greater the mass of evidence in the case, the heavier the burden imposed by it on the mental faculties of the judge [i.e. the jury]; the heavier burden on the judge's mind, the greater the probability that his force of mind will not be adequate to the sustaining of it, to the acting under it in such a manner as to extract the truth from the mass of matter through which it is diffused, to frame himself a right judgment respecting the principal facts in dispute and to decide in consequence." (§ 7907, quoting Jeremy Bentham)

Likewise, in *Scott* v. *United States*, 263 F.2d 398 (5th Cir., 1959), the Court perceptively declared:

"Verdicts in closely contested criminal cases often find their real spring in the atmosphere generated in and by the trial where things felt but unseen, sometimes real, sometimes illusory, arising

> out of, but more than, the relevant and admissible evidence, in the end more influence the verdict than does the relevant testimony itself."

The following often-cited excerpt from the concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440 (1949), is quite applicable:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which the evidence and acts and declarations of each in the course of its execution are admissible. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that the conspiracy existed. * * *
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits." (336 U.S. at 353-4).

The best example of the unfair position in which Ford was thrust at trial is demonstrated by the government's summation which, paragraph upon paragraph, heaped the stench of corrupt conduct around Ford, leading the jury to conclude that an attorney acting as such, must himself be corrupt when he represents persons who are engaged in such a multitude of unlawful activities. This despite the absence of meaningful proof that Ford knowingly participated in even a fraction of such activities.

In accordance with the authorities cited *supra*, the motion for a severance should have been granted, particularly in view of the trial court's demonstrated recognition of the potential for prejudice in this case by its grant of a separate trial to a co-defendant on precisely those grounds.

It has frequently been held that lengthy trials that are the result of cumulative, although relevant and admissible, evidence, may result in such unfairness to a defendant as to be violative of his right to a fair trial. As was stated by Mr. Justice Cardozo in *Shepard* v. *United States*, 290 U.S. 96, 105 (1933): "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *See also*: *United States* v. *Costello*, 221 F.2d 668 (2d Cir., 1955), *aff'd.* 350 U.S. 359 (1956); *International Shoe Machine Corp.* v. *United States*, 315 F.2d 449, 459 (1st Cir.), *cert. den.*, 375 U.S. 820 (1963); Wigmore on *Evidence* (3d Ed.), § 7907.

If Ford had been tried alone or, perhaps with selected other defendants, he would have been in a position to request that the Court, as a matter of law or in the exercise of discretion, exclude from evidence many activities of others as to which Ford had no participation or knowledge. By virtue of the joint trial, however, that course was foreclosed since the proof related to the guilt of other defendants.

It is respectfully submitted that the denial of a severance deprived Ford of a fair trial and requires a reversal of his conviction.

B. The Trial Proof Demonstrated That The Conspiracy Count Of The Indictment Did, In Fact, Charge Multiple Conspiracies.

As already indicated, Ford was tried upon a conspiracy count which charged a number of distinct

conspiracies, as to several of which there is no evidence that he had any knowledge or participation.

As we shall demonstrate, *infra*, at p. 28, it was only by this mixture of conspiracies that the government was able to secure venue, as regards Ford, in the Southern District of New York. If he did not participate in the New York conspiracy, i.e., the trading and pledging of stock in New York, then there was no venue as to him in New York. Additionally, a large bulk of the government's evidence in this case, all of which was adduced against Ford, but as to which he had no knowledge or participation, was derived through hearsay. As to those conspiracies of which he was not a part, he was deprived of his Sixth Amendment right to confront and cross-examine those whose hearsay statements were used against him, many of whom were his co-defendants. *See*: *United States* v. *Steinberg*, 525 F.2d 1126, 1134 (2d Cir., 1975).

In *United States* v. *Kates*, 508 F.2d 208 (3d Cir., 1975), the Court held:

> "It is imperative, however, that we keep in mind the essential nature of what a conspiracy is in general and what this particular conspiracy was proven to be. It is well established that the 'jist' of a conspiracy is an agreement. However slight or circumstantial the evidence may be, it must, in order to be sufficient to warrant affirmance, tend to prove that the appellant entered into some form of agreement, formal or informal, with his alleged conspirators. Similarly, we have stated that the essence of a conspiracy is a 'unity of purpose' or 'common design.' We must also find in this case that [the appellant] knowingly entered into the conspiracy and that he had the specific intent to defraud. . . . As the Court of Appeals

> for the Ninth Circuit stated in reversing a conspiracy conviction under this same statute, 'we must be ever mindful that the requisite mental state in a prosecution for fraud is a specific intent to defraud and not merely knowledge of shadowy dealings'. *United States* v. *Piepgrass*, 425 F.2d 194, 199 (9th Cir., 1970)." (508 F.2d at 310-311)

The United States Court of Appeals for the Sixth Circuit has stated the same principle in a different way:

> "Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of some law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond reasonable doubt of the particular offense against the federal criminal law with which the defendant has been charged." *United States* v. *Sworthout*, 420 F.2d 831, 833 (6th Cir., 1970).

In determining whether the evidence is sufficient to withstand a motion for judgment of acquittal, the proper test is that which was announced by Judge Prettyman in *Curley* v. *United States*, 160 F.2d 229 (D.C. Cir., 1947):

> "The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of *justifiable* inferences of fact from *proven* facts. *It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy.* The critical point in this boundary is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have

such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.***

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.* If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter." 160 F.2d at 232-233). [Emphasis added]

If Ford had been tried as to the stock manipulation conspiracy or the non-registration conspiracy, he would necessarily have been acquitted, since there was no evidence that he had any knowledge or participation in those conspiracies. It cannot, therefore, be argued that he was a member of each of the several conspiracies and was not, for that reason, prejudiced by proof of multiple conspiracies.

To the same effect *see*: *United States* v. *Taylor*, 464 F.2d 340 (2d Cir., 1972); Wright, *Federal Practice and Procedure*, § 467; Orfield, *Criminal Procedure Under the Federal Rules*, § 29:19; *Moore's Federal Practice*, Vol. 8, § 29.06 [Cipes ed.]

Our contentions in this regard conform to the reversals of judgments of convictions against attorneys in *United States* v. *Browne*, 225 F.2d 751 (7th Cir., 1955), at 757-759 and *Milam* v. *United States*, 322 F.2d 104 (5th Cir., 1963) at 106-108.

In *Kotteakos* v. *United States*, 328 U.S. 750, 773 (1946), the Court made clear that the joinder of multiple defendants in a mass trial based on a conspiracy charge is a situation ". . . exceptional to our traditions and call[s] for use of every safeguard to individualize each defendant in his relation to the mass." *See also*: *United States* v. *Wolfson*, 437 F.2d 862, 870 (2d Cir., 1970); *United States* v. *Branker*, 395 F.2d 881, 887 (2d Cir., 1968).

In *United States* v. *Sperling*, 506 F.2d 1323, 1340-1 (2d Cir., 1974), this Court said:

> "In view of the frequency with which the single conspiracy versus multiple conspiracies claim is being raised on appeals before this Court * * * we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government having prosecuted the offenses here involved in one rather than two conspiracy trials. On the contrary, many serious problems were created at the trial level,

> including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we have had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants."

The millstone of the independent conduct of numerous other persons was cast upon the defendant Ford. It is clear that the government did not rely upon evidence showing Ford's activities and knowledge, but rather upon the sheerest speculation, unsupported by evidence, that Ford had some knowledge that an extraordinary number of fraudulent activities were being engaged in by numerous other persons. The government's case was grounded upon nothing more than the dreaded concept of guilt by association. The difficulty of the defense in this regard, was compounded by the fact that there was much testimony concerning the wrongdoing of others, both within and without the context of the Select stock situation.

That conclusion is all the more compelled by this Court's recent opinion in *United States* v. *Bertolotti*,— F.2d — (November 10, 1975) slip sheet ops. at 6409. In *Bertolotti*, this Court stated:

> "When convictions have been obtained on the theory that all defendants were members of a single conspiracy although, in fact, the proof disclosed multiple conspiracies, the error of variance has been committed. [Citations omitted]" (Slip sheet ops. at 6417)

In reversing the conviction in *Bertolotti* upon the ground that prejudicial multiple conspiracies were established, this Court further stated:

> "Our examination of the evidence reveals a sufficient basis for the jury to be satisfied beyond a

reasonable doubt that each of the asserted transactions took place, but no evidence linking them together in a single overall conspiracy. [Citations omitted]. Indeed, the only common factor linking the transactions was the presence of Rossi and Coralluzzo. This type of nexus has never been held to be sufficient. [Citation omitted]. We find our description of the operation in *Miley* perfectly apt in the instant case. The operations centering around Rossi and Coralluzzo could hardly be attributed to any real organization, even a 'loosely knit' one. [Citation omitted] There was no evidence to show that these two 'were conducting what could seriously be called a regular business on a steady basis.' The scope of the operation was defined only by Rossi's resourcefulness in devising new methods to make money.

"It is clear to us that the government has merely merged several conspiracies for the sake of convenience. [Citation omitted]." (Slip sheet ops. at 6419).

The Government's merger of several conspiracies in the present case improperly and prejudicially subjected Ford to a deluge of evidence with respect to the unrelated criminal conduct of numerous other persons. In this connection, it is significant to note that the consolidated indictments named 17 defendants and 4 unindicted conspirators. Thereafter, despite Ford's March 14, 1975 motion for disclosure of the names and addresses of unindicted conspirators (A. 1127), the Government's agreement to supply the same (A. 1113), and a March 18, 1975 order of Judge Pollack directing the Government to comply with its agreement (A. 1140), it was not until September 5, 1975, shortly before trial, that the Government filed a bill of particulars specifying 33 additional conspirators (A. 100). Thus, the total number of alleged conspirators, including defendants, amounted to 54.

Practically all of these engaged in activities which were not shown to be known or participated in by Ford. *See* discussion in *United States* v. *Bertolotti*, *supra*, Slip Sheet Ops. at 6421-4, which makes clear that such a merger of unrelated conspiracies with numerous conspirators is inherently prejudicial to a defendant. *See also*: *United States* v. *Gentile*, — F.2d — (2d Cir. 1976) Slip Sheet Ops. 1851, 1856 fn. 4 (Sept. Term, 1975).

It is respectfully submitted that the multiple conspiracies shown by the Government's evidence in the present case, and the prejudice which accrued to Ford as a result, require the reversal of his conviction.

C. Venue Jurisdiction Was Lacking in the Southern District of New York Since the Defendant Was Not a Member of a Conspiracy to Manipulate the Stock Market or to Deal in Unregistered Securities or to Unlawfully Pledge Securities.

Lack of venue is a jurisdictional defect, *United States* v. *Gross*, 276 F.2d 816, 819 (2d Cir., 1960); *United States* v. *Grossman*, 400 F.2d 951 (4th Cir., 1968). Failure to prove venue against a defendant taints the indictment, makes it defective and requires its dismissal. *United States* v. *Bink*, 74 F. Supp. 604, 608 (D.C.D. Ore., 1947); *United States* v. *Bozza*, 365 F.2d 206, 220-221 (2d Cir., 1963).

As stated by Justice Frankfurter in *United States* v. *Johnson*, 323 U.S. 273, 275 (1944):

> "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the

> vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

Article II, § 2, ¶ 3 of the Constitution of the United States, provides:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

Similarly, the Sixth Amendment of the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law***."

We urge, therefore, aside from the inherent prejudice of being forced to participate in a mass trial and of being subjected to large volumes of hearsay without benefit of the opportunity to confront or cross-examine, Ford was also prejudiced by being forced to stand trial the length of a continent away from any of the activities in which he allegedly participated or had knowledge.

POINT II

The trial court failed to properly charge the jury with respect to the multiple conspiracy issue.

In *United States* v. *Cohen*, 518 F.2d 727 (2d Cir., 1975), this Court reaffirmed the rule in this Circuit with respect to the multiple conspiracy charge that ought be given to the jury:

> "*The trial court also fully instructed the jury that they could not convict unless they found the defendants had been engaged in a single conspiracy rather than engaged in separate or multiple conspiracies.* Cohen objects that the court's instruction that '. . . if you find that the government has failed to prove the existence of only one conspiracy, you must find the defendants not guilty' was an 'all or nothing' charge similar to the one found impermissible in United States v. Kelly, 349 F.2d 720, 757-758 (2d Cir., 1965), cert. den. 384 U.S. 947 (1966). *Such instructions have been held proper in recent cases.* See, e.g., United States v. Sperling, 506 F.2d 1323, 1341 (2d Cir., 1974); United States v. Bynum, 485 F.2d 490, 497 (2d Cir., 1973).***" (518 F.2d 727 at 735) [Emphasis added]

In the present case, the trial court went on at length concerning the manner in which a defendant may be held liable for conspiratorial activities unknown to him and for acts of unknown co-conspirators (Tr. 2529 *-2532; A. 868-870). Then it gave its charge with respect to multiple conspiracies, which must necessarily have been incomprehensible to the jury:

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* Page 2529 of the Court's charge is missing from the appellant Mullenax's appendix.

"Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

"If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a deefndant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy." (A. 870).

The Court's charge thoroughly missed the point that if all of the activities specifically charged in the conspiracy count of the indictment are shown, in fact, to have been a conglomeration of separate conspiracies, then the jury is obliged to acquit. Whatever else the Court's charge means, if anything, it certainly doesn't mean that. In view of the utter failure of the Court's charge in this respect, the judgment of conviction must be reversed. *See*: *United States* v. *Natelli*, — F.2d — (2d Cir., 1975) Slip Sheet Ops. 5165, 5189-91 (Sept. Term, 1984), *vacated*, — F.2d — (1975), Slip Sheet Ops. 1913 (Sept. Term, 1975), *reinstated*, — F.2d — Slip Sheet Ops., —— (Sept. Term, 1975).

POINT III

The Court erred in refusing to charge the jury that the particular conspiracy as to which the defendant might be found to be a member must also be found to have venue based in the Southern District of New York.

Following the Court's charge, counsel for Ford Specifically requested that the Court charge the jury with respect to the requirement of venue in relation to the multiple conspiracy problem:

> "[Defense Counsel]: Your Honor said, in effect, if the jury finds there is a conspiracy to commit any of the crimes in the first indictment [sic], and an overt act committed in the Southern District of New York in furtherance of that crime, that conspiracy, then you may find the defendants guilty.
>
> "I ask your Honor to charge specifically if they find there was a conspiracy to commit one of the crimes in that indictment, they must find that an overt act directed toward that particular conspiracy must be committed in the Southern District of New York. In effect there were four conspiracies rolled into one. The jury may find that there is one, but yet, as to the one they feel——
>
> "The Court: I would think that you would mount confusion on confusion by asking me to add to what I think is otherwise a very clear statement of the multiple conspiracy situation as announced by the Court of Appeals in a case that was tried by Judge Duffy. I assume you are familiar with the case I am talking about.
>
> "[Defense Counsel]: Tramonti?
>
> "The Court: Yes.

"[Defense Counsel]: The problem here is that there are certain problems for some defendants who never left Nevada or Texas, or whatever, and although I realize there is confusion, I think that is caused by the inclusion of one——

"The Court: That would breed confusion rather than clear anything." (A. 901-903)*

We have set forth *supra*, under part C of Point I, our argument concerning the essential requirement that the government establish proper venue. By refusing to charge as requested by counsel, the Court effectively withdrew that issue from the jury as regards the multiple conspiracy problem. The effect of the Court's deficient multiple conspiracy charge combined with its deficient charge on venue geometrically multiplies the probability that the defendant was wrongfully convicted.

The Court's refusal to charge as requested requires a reversal of the conviction.** The failure to so charge impermissibly removed the issue from the jury's consideration. *United States* v. *Singleton*, — F.2d —, Slip Sheet Ops. 1873, 1886-9 (September Term, 1975; Feb. 13, 1976; 2d Cir.).

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* The colloquy continued as follows:

"The Court: Is there anything else?

"[Defense Counsel]: I go along with that.

"I would except to the Pinkerton charge in view of the fact that it is over the broad scale conspiracy charged in the first count." (A. 903)

We have noted counsel's statement out of an excess of caution. The Court had certainly ruled on the issue and there was no reasonable likelihood that it was going to change its ruling. Moreover, the complete context leaves no reason to believe that counsel was assenting to the Court's ruling. Instead, his comment appears to be directed elsewhere.

** The Court's charge as to venue appears at A. 861-2, 872-3. *See also*: A. 890.

POINT IV

The judgments of conviction as to all of the counts should be reversed and dismissed.

As has been already argued at length, the evidence failed to establish that the defendant Ford participated in or was aware of the activities underlying the substantive counts of the indictment.

In *Ingram* v. *United States*, 360 U.S. 672 (1959), the Court reaffirmed the proposition that:

> "Without knowledge, the intent cannot exist. * * * Furthermore to establish an intent, the evidence of knowledge must be clear not equivocal. * * * This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes." (360 U.S. at 680).

As was stated by the Court in *Scales* v. *United States*, 367 U.S. 203, 224 (1961), "in our jurisprudence guilt is personal. . . ."

It is clear that Ford could not have been convicted with respect to the substantive counts based upon his own conduct. There was no proof that he had any knowledge of the substantive crimes. Certainly that is true with respect to Counts 2 through 51. Moreover, he did not participate in the preparation of the documents underlying Counts 52 and 53. His activities with respect to acquisitions that were noted in those documents were not shown to have any relation to an intent on his part to defraud the public.*

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* If the Court agrees with our contention in this regard, there is no basis for Ford's conspiracy conviction, since he lacked any criminal intent whatsoever.

Finally, since the Court charged the jury, pursuant to *Pinkerton* v. *United States*, 328 U.S. 640 (1946), that a defendant may be convicted of substantive offenses if such offenses were committed pursuant to a conspiracy of which the defendant was a part, the substantive counts must necessarily fall in view of our contention, *supra*, that the conspiracy charged by the indictment was in fact several distinct conspiracies. If, as we urge, the defendant was clearly not established to be a member of those conspiracies out of which all or most of the substantive crimes must have grown, then he simply cannot be held liable under the *Pinkerton* theory. *United States* v. *Cianchetti*, 315 F.2d 584, 587 (2d Cir., 1963); *United States* v. *Steinberg*, 525 F.2d 1126 (2d Cir., 1974); *United States* v. *Natelli*, *supra*.

POINT V

The appellant Ford adopts all relevant points raised by the co-appellants.

CONCLUSION

For all of the above reasons, the judgment of conviction should be reversed and the indictment should be ordered dismissed. In the alternative, the appellant should be granted a new trial.

Respectfully submitted,

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